Maryland General Assembly
Department of Legislative Services

Proposed Regulations
Department of Health and Mental Hygiene

(DLS Control No. 14-007)

Overview and Legal and Fiscal Impact

The regulations require State-regulated payors to make incentives available to primary care practices for the adoption and use of electronic health records. In order to receive an incentive, a primary care practice is required to meet national requirements relating to the use of an electronic health record. The regulations extend the incentives by two years and specify a process by which payors are required to report to the State on program implementation.

The regulations present no legal issues of concern.

There is no fiscal impact on State or local agencies.

Regulations of COMAR Affected

Department of Health and Mental Hygiene:

Maryland Health Care Commission: Electronic Health Record Incentives: COMAR 10.25.16.01-.07

Legal Analysis

Background

Chapter 689 of 2009 required the Maryland Health Care Commission, in consultation with the Department of Health and Mental Hygiene, payors, and health care providers, to adopt regulations that require State-regulated payors to provide incentives to health care providers to promote the adoption and meaningful use of electronic health records. On and after the later of January 1, 2015, or the date established for the imposition of penalties under the federal American Recovery and Reinvestment Act of 2009, each health care provider using an electronic health record that seeks payment from a State-regulated payor is required to use electronic health records that are (1) certified by a national certification organization designated by the commission and (2) capable of connecting to and exchanging data with the health information exchange designated by the commission.

Summary of Regulations

Program Description

The regulations require an Electronic Health Records (EHR) adoption incentive to be available to a primary care practice that meets specified requirements. A payor may exclude from the EHR adoption incentive calculation of a primary care practice the payor's patient members who were previously included in another primary care practice's EHR adoption incentive calculation. The commission is authorized to conduct audits to determine compliance with the regulations.

Participation Requirements

To be eligible for an EHR adoption incentive, the regulations require a primary care practice to (1) adopt a certified electronic health record; (2) complete and submit an EHR adoption incentive request to each appropriate payor from which the practice desires an incentive award; and (3) demonstrate that the primary care practice has either attested to the current meaningful use requirements under the Medicare or Medicaid EHR Incentive Program or participates in any commission approved patient centered medical home program and has achieved the National Committee for Quality Assurance level two recognition. The regulations establish requirements for the content of an EHR adoption incentive request including (1) the estimated total number of patients on the practice panel, if available; (2) the name and version of the certified electronic health record implemented by the primary care practice; (3) specified documentation that the primary care practice meets the criteria for the EHR adoption incentive; and (4) an attestation signed by an authorized member of the primary care practice that the information contained in the request is accurate and that all the members of the practice are using the certified electronic health record system.

The regulations require a primary care practice that provided an attestation to meaningful use to give written notice within 90 days to each payor that awarded an EHR adoption incentive to the practice in the event that the Centers for Medicare & Medicaid Services, Medicaid, or its designated entity (1) conducted a prepayment or post-payment audit of compliance with the participation requirements of the Medicare or Medicaid EHR Incentive Program regarding the physician or nurse practitioner identified by the primary care practice as part of its EHR adoption incentive request or (2) determined that the physician or nurse practitioner had not met the requirements under the Medicare or Medicaid EHR Incentive Program. A payor is required to process and pay in full the adoption incentive within 75 days of receiving a complete EHR adoption incentive request.

Incentive Payment Calculation by Payor

An EHR adoption incentive is calculated at $25 per member, up to a maximum of $15,000, and limited to the payor's patient members on the practice panel. On request by a primary care practice, a payor is required to provide the practice, in a timely manner, with an accounting of its EHR adoption incentive, including the names of each patient included in the EHR adoption incentive calculation.

Reporting

A payor is required to submit (1) an annual report to the commission for calendar years 2011 through 2016 no later than 90 days after the end of each calendar year and (2) at the request of the commission, an interim report within 30 days of the commission's request. The regulations require an annual and interim report to include (1) the number of EHR adoption incentive requests received by the payor for the requested calendar year or time period; (2) the number of EHR adoption incentive payment requests processed by the payor for the requested calendar year or time period; (3) the total value of incentives distributed for the calendar year or time period; and (4) other information available to the payor and requested by the commission to determine the effectiveness of EHR adoption incentive programs. A payor is required to submit a final report to the commission no later than May 31, 2017, that includes all information that is required in an annual report under the regulations.

Legal Issue

The regulations present no legal issue of concern.

Statutory Authority and Legislative Intent

The commission cites §§ 19-103(c)(2)(i) and (ii), 19-109(a)(1), and 19-143(d)(1), (2), (3), (4), and (i) of the Health – General Article as authority for the regulations. Section 19-103(c)(2)(i) and (ii) specifies that one of the purposes of the commission is to promote the development of a health regulatory system that provides, for all Marylanders, financial and geographic access to quality health care services at a reasonable cost by advocating polices and systems to promote the efficient delivery of an improved access to health care services. Section 19-109(a)(1) authorizes the commission to adopt regulations to carry out specified provisions of law. Section 19-143(d)(1), (2), (3), (4), and (i) require the commission, in consultation with the Department of Health and Mental Hygiene, payors, and health care providers, to adopt regulations that require State-regulated payors to provide incentives to health care providers to promote the adoption and meaningful use of electronic health records. In addition, on or after the later of January 1, 2015, or the date established for the imposition of penalties under the federal American Recovery and Reinvestment Act of 2009, each health care provider using an electronic health record that seeks payment from a State-regulated payor is required to use electronic health records that are (1) certified by a national certification organization designated by the commission and (2) capable of connecting to and exchanging data with a health information exchange designated by the commission.

This authority is correct and complete. The regulations comply with the legislative intent of the law.

Technical Corrections and Special Notes

As submitted, the proposed regulations define "payor" to include the State Employee and Retiree Health and Welfare Benefits Program. The definition of "State-regulated payor" in § 19-142 of the Health – General Article does not include the program. Section 19-143(d)(7) of the Health – General Article provides that the intent of the General Assembly is that the program support the incentives provided for electronic health records through contracts between the

program and the third party administrators arranging for the delivery of health care services to members covered by the program. However, the program is not considered to be a State-regulated payor under § 19-143 of the Health – General Article.

After discussion with staff, the commission has agreed to delete the reference to the program in the definition of "payor" in the proposed regulations. The commission will do so when the regulations are published for final adoption.

Fiscal Analysis

There is no fiscal impact on State or local agencies.

Agency Estimate of Projected Fiscal Impact

The regulations require State-regulated payors to make incentives available to primary care practices for the adoption and use of EHRs. In order to receive an incentive, a primary care practice is required to meet national requirements relating to the use of an EHR. The regulations extend the existing incentives by two years and specify a process by which payors are required to report to the State on program implementation.

Impact on Budget

There is no impact on the State operating or capital budgets.

Agency Estimate of Projected Small Business Impact

The Maryland Health Care Commission advises that the regulations have minimal or no economic impact on small businesses in the State. The Department of Legislative Services disagrees. Small business primary care practices may receive incentives under the extended period.

Additional Information

As noted above, the initial regulations submitted by the commission erroneously include the State Employee and Retiree Health and Welfare Benefits Program (State plan) under the definition of "payor." However, as the commission indicates that the State plan will be removed, there is no fiscal impact. Although initially included, Chapter 380 of 2011 removed the State plan from the definition and instead stated that it is the intent of the General Assembly that the State plan support incentives for the adoption and use of EHRs through contracts between the State plan and certain third-party administrators.

Contact Information

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